

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Electronic Communications and Evidentiary Privileges

February 2002

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

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February 11, 2002

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

The Law Revision Commission recommends revision of Evidence Code provisions to make clear that (1) a privileged communication does not lose its privileged status simply because it is transmitted electronically, and (2) the statutory presumption of confidentiality and statutory waiver requirements apply to newly created privileges. Evid. Code §§ 912, 917, 952.

This recommendation is submitted pursuant to Resolution Chapter 78 of the Statutes of 2001.

Respectfully submitted,

Joyce G. Cook
Chairperson

ELECTRONIC COMMUNICATIONS AND EVIDENTIARY PRIVILEGES

The Law Revision Commission has initiated a review of the Evidence Code to determine whether existing provisions are satisfactory in their application to electronic communications.¹ Pursuant to that review, legislation was enacted on Commission recommendation to repeal the Best Evidence Rule² and replace it with the Secondary Evidence Rule.³ The Commission now recommends that the Evidence Code provisions governing privileges for communications made in confidence between persons in specified relationships (“confidential communication privileges”) be standardized in their application to electronic communications.

Confidentiality of Electronic Communications

Evidence Code Section 952 defines a confidential communication for purposes of the lawyer-client privilege. The provision was revised in 1994 to add a sentence stating, “A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer.”⁴ This language addresses the potential argument

1. See Harvey, *The Need for Evidence Code Revisions To Accommodate Electronic Communication and Storage* (Background Study, June 2000). The background study may be obtained from the Commission’s website at <<http://www.clrc.ca.gov/pub/Printed-Reports/BKST-811-HarveyElecEvid.pdf>>.

2. See *Best Evidence Rule*, 26 Cal. L. Revision Comm’n Reports 369 (1996).

3. See Evid. Code § 1521; 1998 Cal. Stat. ch. 100. Unless otherwise indicated, all further statutory references are to the Evidence Code.

4. 1994 Cal. Stat. ch. 587, § 9. This was a noncontroversial reform in an omnibus civil practice bill authored by the Assembly Judiciary Committee. It has been praised in commentary. See O’Neil III, et al., *Detours on the Informa-*

that, because an electronic communication between a lawyer and client is subject to interception, it is not confidential and thus not protected by the lawyer-client privilege.

This potential argument applies to all of the confidential communication privileges, not just the lawyer-client privilege. But the addition of the language on electronic communications in the lawyer-client privilege, combined with the lack of such language in comparable provisions for other relationships,⁵ provides grounds for an argument that there is no confidentiality and therefore no privilege for an electronic communication made in the course of any other relationship.

To negate that potential argument, the language on confidentiality of an electronic communication should be removed from Section 952 and generalized in Section 917, which creates a presumption of confidentiality for communications made in privileged relationships.⁶ The Commission further

tion Superhighway: The Erosion of Evidentiary Privileges in Cyberspace & Beyond, 1997 Stan. Tech. L. Rev. 3:

This legislation is a useful model because it is broad enough to encompass new and emerging technologies and to remove the need for judicial evaluation of these technologies. Most importantly, it provides the protection necessary to allow lawyers and their clients to freely and efficiently use new technologies without risk of waiver.

5. See Sections 980 (confidential marital communication), 992 (confidential communication between patient and physician), 1012 (confidential communication between patient and psychotherapist), 1032 (penitential communication), 1035.4 (confidential communication between sexual assault victim and counselor), 1037.2 (confidential communication between domestic violence victim and counselor).

6. New York has a provision along these lines. See N.Y. C.P.L.R. 4548 (McKinney 2001) ("No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication."). See also 18 U.S.C. § 2517(4) ("No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.").

recommends that references to specific modes of communication (e.g., email, facsimile, cellular telephone, or cordless telephone) be omitted from the statute, and that a broad definition of “electronic” be included.⁷ By using generic terminology, the proposed legislation would provide flexibility to accommodate new technologies.

Newly Created Privileges

Generalization of the language on electronic communications exposes a flaw in the drafting of Section 917. The provision creates a presumption of confidentiality for communica-

7. The proposed definition of “electronic” is the same as in the Uniform Electronic Transactions Act (1999), which was enacted in California as Civil Code Sections 1633.1-1633.17. The comment to Section 2 of the Uniform Electronic Transactions Act (Civ. Code § 1633.2) states:

“Electronic.” The basic nature of most current technologies and the need for a recognized, single term warrants the use of “electronic” as the defined term. The definition is intended to assure that the Act will be applied broadly as new technologies develop. The term must be construed broadly in light of developing technologies in order to fulfill the purpose of this Act to validate commercial transactions regardless of the medium used by the parties. Current legal requirements for “writings” can be satisfied by almost any tangible media, whether paper, other fibers, or even stone. The purpose and applicability of this Act covers intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form, but which lack the tangible aspect of paper, papyrus or stone.

While not all technologies listed are technically “electronic” in nature (e.g., optical fiber technology), the term “electronic” is the most descriptive term available to describe the majority of current technologies. For example, the development of biological and chemical processes for communication and storage of data, while not specifically mentioned in the definition, are included within the technical definition because such processes operate on electromagnetic impulses. However, whether a particular technology may be characterized as technically “electronic,” i.e., operates on electromagnetic impulses, should not be determinative of whether records and signatures created, used and stored by means of a particular technology are covered by this Act. This act is intended to apply to all records and signatures created, used and stored by any medium which permits the information to be retrieved in perceivable form.

tions made in the specific relationships that were mentioned in the Evidence Code when the code was created in 1965. At that time, the only confidential communication privileges contained in the code were the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, and husband-wife privileges. Since then, the Legislature has created two additional confidential communication privileges: A privilege for confidential communications between a sexual assault victim and counselor,⁸ and a privilege for confidential communications between a domestic violence victim and counselor.⁹

Under Section 917, a communication made in the course of one of the listed relationships is presumed to have been made in confidence, and the party opposing a claim of privilege has the burden to establish that the communication was not confidential. The policy considerations underlying this presumption apply equally to all of the confidential communication privileges.¹⁰ The provision should be revised to make clear

8. Sections 1035-1036.2.

9. Sections 1037-1037.7.

10. The 1965 Comment to Section 917 explains the policy considerations and discusses the effect of the presumption:

A number of sections provide privileges for communications made “in confidence” in the course of certain relationships. Although there appear to have been no cases involving the question in California, the general rule elsewhere is that a communication made in the course of such a relationship is presumed to be confidential and the party objecting to the claim of privilege has the burden of showing that it was not. [Citations omitted.]

If the privilege claimant were required to show that the communication was made in confidence, he would be compelled, in many cases, to reveal the subject matter of the communication in order to establish his right to the privilege. Hence, Section 917 is included to establish a presumption of confidentiality, if this is not already the existing law in California. See *Sharon v. Sharon*, 79 Cal. 633, 678, 22 Pac. 26, 40 (1889) (attorney-client privilege); *Hager v. Shindler*, 29 Cal. 47, 63 (1865) (“*Prima facie*, all communications made by a client to his

that the presumption of confidentiality applies to all of the confidential communications privileges.

Similarly, the provision governing waiver of a privilege (Section 912) should be revised to make clear that it applies to the privilege for confidential communications between a domestic violence victim and counselor. The provision has already been amended to include the privilege for confidential communications between a sexual assault victim and counselor.

attorney or counsel [in the course of that relationship] must be regarded as confidential.”).

To overcome the presumption, the proponent of the evidence must persuade the presiding officer that the communication was not made in confidence. Of course, if the facts show that the communication was not intended to be kept in confidence, the communication is not privileged. See *Solon v. Lichtenstein*, 39 Cal. 2d 75, 244 P.2d 907 (1952). And the fact that the communication was made under circumstances where others could easily overhear is a strong indication that the communication was not intended to be confidential and is, therefore, unprivileged. See *Sharon v. Sharon*, 79 Cal. 633, 677, 22 Pac. 26, 39 (1889); *People v. Castiel*, 153 Cal. App. 2d 653, 315 P.2d 79 (1957).

PROPOSED LEGISLATION

Evid. Code § 912 (amended). Waiver

SECTION 1. Section 912 of the Evidence Code is amended to read:

912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), or 1035.8 (sexual assault victim-counselor privilege), or 1037.5 (*domestic violence victim-counselor privilege*) is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), or 1035.8 (sexual assault victim-counselor privilege), or 1037.5 (*domestic violence victim-counselor privilege*), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), or 1035.8 (sexual assault victim-counselor privilege), or 1037.5 (*domestic violence victim-counselor privilege*), when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, psychotherapist, or sexual assault counselor, or *domestic violence counselor* was consulted, is not a waiver of the privilege.

Comment. Section 912 is amended to make clear that it applies to the privilege for confidential communications between a domestic violence victim and counselor, which did not exist when the statute was originally enacted in 1965. See Sections 1037-1037.7 (domestic violence victim).

Evid. Code § 917 (amended). Presumption of confidentiality

SEC. 2. Section 917 of the Evidence Code is amended to read:

917. (a) Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, or husband-wife, *sexual assault victim-counselor, or domestic violence victim-counselor* relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

(b) *A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character solely because it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.*

(c) For purposes of this section, “electronic” has the meaning provided in Section 1633.2 of the Civil Code.

Comment. Subdivision (a) of Section 917 is amended to make clear that it also applies to confidential communication privileges created after its original enactment in 1965. See Sections 1035-1036.2 (sexual assault victim), 1037-1037.7 (domestic violence victim). The presumption set forth in subdivision (a) applies regardless of how a communication is transmitted. In each instance, the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

Subdivision (b) is drawn from New York law (N.Y. C.P.L.R. 4548 (McKinney 2001)) and from language formerly found in Section 952 relating to confidentiality of an electronic communication between a client and a lawyer. For waiver of privileges, see Section 912 & Comment.

Under subdivision (c), the definition of “electronic” is broad, including any “intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form.” Unif. Electronic Transactions Act, § 2 comment (1999) (enacted as Civ. Code § 1633.2).

For discussion of ethical considerations where a lawyer communicates with a client by electronic means, see Bus. & Prof. Code § 6068(e) (attorney has duty to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client”); ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 99-413 (“Protecting the Confidentiality of Unencrypted E-Mail”); ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 92-368 (“Inadvertent Disclosure of Confidential Materials”).

For examples of provisions on the admissibility of electronic communications, see Evid. Code §§ 1521 & Comment (Secondary Evidence Rule), 1552 (printed representation of computer information or computer program), 1553 (printed representation of images stored on video or digital medium); Civ. Code § 1633.13 (“In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.”). See also *People v. Martinez*, 22 Cal. 4th 106, 990 P.2d 563, 91 Cal. Rptr. 2d 687 (2000); *People v. Hernandez*, 55 Cal. App. 4th 225, 63 Cal. Rptr. 2d 769 (1997); *Aguimatang v. California State Lottery*, 234 Cal. App. 3d 769, 286 Cal. Rptr. 57 (1991); *People v. Lugashi*, 205 Cal. App. 3d 632, 252 Cal. Rptr. 434 (1988).

Evid. Code § 952 (amended). “Confidential communication between client and lawyer” defined

SEC. 3. Section 952 of the Evidence Code is amended to read:

952. As used in this article, “confidential communication between client and lawyer” means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. ~~A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer.~~

Comment. Section 952 is amended to delete the last sentence concerning confidentiality of electronic communications, because this rule is generalized in Section 917(b)-(c) applicable to all confidential communication privileges.
